Supreme Court, U.S.
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No. 93-114

In The

Supreme Court of the United States

October Term, 1993

LEGACY, LTD.,

Petitioner,

v.

CHANNEL HOME CENTERS, INC., CHANNEL HOME CENTERS REALTY CORPORATION and CHANNEL ACQUISITION COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE RESPONDENTS' POSITION HIGHLIGHTS THE CONFLICT AND CONFUSION AMONG THE CIRCUITS IN THE INTERPRETATION OF SECTION 365(d)(4) 1

(i) Fifth and Ninth Circuits 1

(ii) Third Circuit 2

II. THE THIRD CIRCUIT'S DECISION IGNORED THE ESTABLISHED STANDARDS OF STATUTORY INTERPRETATION 4

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

In re American Healthcare Management, Inc., 900 F.2d 827 (5th Cir. 1990) 2

In re Southwest Aircraft Servs., Inc., 831 F.2d 848 (9th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988) ... 1, 2

STATUTES

11 U.S.C. § 365 ..... *passim*

ARGUMENT

I. THE RESPONDENTS' POSITION HIGHLIGHTS THE CONFLICT AND CONFUSION AMONG THE CIRCUITS IN THE INTERPRETATION OF SECTION 365(d)(4).

Petitioner, Legacy, Ltd. ("Legacy"), contended in its Petition that under the analysis of the Fifth and Ninth Circuits, the only cause which will support additional extensions is a cause that first arises prior to the expiration of the initial 60-day period following the entry of the order for relief and that the Third Circuit's reading of Section 365(d)(4) permitted any cause to be the basis for additional extensions. (Petition, 4). Respondents ("Channel") contend that no such conflict exists. The situation is as follows:

(i) *Fifth and Ninth Circuits.*

> Respondents, in opposition to Legacy's position, state:
>
> . . . [T]he Fifth and Ninth Circuits do not hold, or even suggest, the cause which supports the first extension must be the same cause which supports any further extension. Legacy cannot, and does not, cite even one passage from the decisions of the Fifth Circuit and Ninth Circuit to support its contention. . . . (Opposition Brief "OB", 11).

Channel's confusion as to the holding of the Fifth and Ninth Circuits is indicative of the problem that has been created. The sole rationale of the holdings for the Fifth and Ninth Circuits is that the phrase "within such 60-day period" of Section 365(d)(4) modifies the noun "cause" rather than the verb "fixes". *See In re Southwest*

Aircraft Servs., Inc., 831 F.2d 848, 849 (9th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988), and *In re American Healthcare Management, Inc.*, 900 F.2d 827 (5th Cir. 1990). The Court in *In re Southwest Aircraft Servs., Inc.*, said:

> If, however, the 60-day term modified "for cause" then *while the cause must arise within 60 days*. . . . (Emphasis added).

The Fifth and Ninth Circuits then found (albeit incorrectly) that the 60-day term modifies "for cause." Since the 60-day term is used by the Fifth and Ninth Circuits to modify "for cause," then the cause must arise within 60 days. This is the only reading that the Fifth and Ninth Circuits could come up with.

(ii) *Third Circuit.*

Channel then challenges Legacy's statement of the Third Circuit's reading of the statute by saying:

> [T]he Third Circuit did not hold, as Legacy contends that it did, that any cause, no matter when it arises, will support an extension. (OB, 11).

Here again Channel's confusion underlines the problem faced by landlords confronted with the existing decisions under Section 365(d)(4). The Third Circuit correctly found that the phrase "within such 60-day period" modifies the verb "fixes." Thus, the 60-day time limitation on the word "*cause*" found by the other circuits does not exist in the Third Circuit. If the Third Circuit allows second, third and fourth extensions to be granted after the 60-day period, then there is no language in the statute that limits the time in which a "cause" must arise to support those additional extensions.

The failure of all three circuits to enforce the unambiguous language of the statute underscores the need for this Court's decision regarding Section 365(d)(4).

Finally, although the Third Circuit recognized that the Ninth Circuit's decisions did not expressly embrace the conclusion that a first extension would not have to be filed within the 60-day period, the Third Circuit specifically and correctly found that this was a "necessary consequence" of the Ninth Circuit's convoluted statutory reading. (App. 14 fn.7). The necessary consequence arises because a cause which will justify an extension can occur on the 60th day and there is nothing plausible about Congress requiring a debtor to file a motion on that same day. For example, the cause could arise on the 60th day, and the cause could come to the Debtor's attention on the 60th day, but not within the time in which the debtor could put together a motion to show cause. Or, the cause could arise on the 60th day (or for that matter, on the 10th, 20th, 30th or 50th day), and the debtor might not find out about the cause until the 61st day or 90th day or 180th day and then file its motion. In either of these events, if the term "within such 60-day period" modifies "for cause," then the extension would be granted under the Fifth and Ninth Circuits' reading of Section 365(d)(4) even though filed after the 60-day period. Businessmen who are making decisions about their rights as landlords and tenants need to have this Court's ruling on the proper application of Section 365(d)(4).

II. THE THIRD CIRCUIT'S DECISION IGNORED THE ESTABLISHED STANDARDS OF STATUTORY INTERPRETATION.

The result reached by the Third Circuit turns statutory interpretation upside down. The Third Circuit concedes that the literal language of the statute produces the results sought by Legacy (App. 16), but changes that result on the grounds that a majority of the panel was "unable to think of a plausible reason why Congress might have wanted to adopt a provision that meant what Legacy says that Section 365(d)(4) means." (App. 16-17).[1] Instead of requiring those who, like Respondents, would depart from the literal language to show a clear congressional contrary intent, the Third Circuit improperly creates a burden on petitioners to prove to some higher standard – that the statute was actually intended to mean what it says. The result reached is almost as if the rule of statutory interpretation is that because Congress failed to add something on the order of "and the Congress *really* intends this" to the explicit language of Section 365(d)(4), the literal language will be regarded as optional.

Abandonment of the literal language in this case is a particular perversion of the process of applying a statute because the Third Circuit conceded there was no legislative history that addressed the question in this case. (App. 10-11). The precedents of this Court, and common sense, dictate that unless there is legislative history which

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[1] Contrary to the panel's comment, Legacy presented several plausible reasons for the literal language. Some of these reasons were restated by Judge Hutchinson in his dissenting opinion. (App. 24-27).

demonstrates squarely that the literal language is not to be enforced, then the statute must be taken to mean what its words say. It violates accepted norms of statutory interpretation for a majority of the panel to have rejected the explicit language of Section 365(d)(4) simply because a majority of the panel was "unable to think of a plausible reason why Congress might have wanted to adopt a provision that meant" what the literal language of the statute said.

In addition, the effect of the Third Circuit's interpretation is unwarranted delay in bankruptcy proceedings that could hardly have been intended by a Congress that chose the words it did in Section 365(d)(4). This point is virtually conceded by footnote 2 of Respondents' brief. Respondents admit that at the time of the Second Extension Motion, which lies at the heart of this case, Respondents "would not have permitted a 'deemed' rejection under Section 365(d)(4)," and Respondents therefore made their unprecedented and wholly invalid contingent assumption.[2] It was with ill grace that Channel even suggested to the Bankruptcy Court that it really needed more time to decide about the Legacy Lease. Channel's

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[2] Proof that Channel did not believe that it could rely on the Bankruptcy Court's ruling of June 21, 1991, is the "Notice of Contingent Assumption of Ground Lease for Premises in Wilmington, Delaware." Notwithstanding what happened at the June 21, 1991 hearing, Channel realized it had to take action before the end of the first extension. However, what Channel decided to do was too late and much too little. The "Notice of Contingent Assumption" was not mailed to Legacy or filed until June 24, 1991, after the expiration of the first extension, and this motion failed to comply with statutory requirements for an assumption.

answers to the Bankruptcy Court at the June 21, 1991 second extension hearing leave no doubt of the status of Channel's decision:

> [Counsel for Channel] Q. In your opinion, did this lease have substantial value?
>
> [Channel's Officer] A. Yes.
>
> Q. And why not assume – why are you seeking a seven month extension of time from the Court?
>
> A. Because we have not made a decision to assume any lease.
>
> Q. Why not?
>
> A. Because we're in the process of developing our business plan which will further define our core stores.
>
> The Court: But let me ask you, Mr. Ercolano [Debtor's sole witness], is it not a fact that even – and this I realize is sheer speculation but even hypothetically, if the Debtor concluded that it was going to go out of the retail business would not this ground lease be a core asset even if you turned yourself into a real estate holding company or you liquidated yourself or a Trustee liquidated you? There's no way that this lease wouldn't be assumed, right?
>
> A. Well, I know there's no way we would reject the lease. That much I know.
>
> The Court: It's a valuable piece of property. You've told us that.
>
> A. We would not reject the lease. We have decided we would not reject this lease.

> The Court: . . . I think the landlord has got a valid point here.

(Transcript of June 21, 1991, pp. 37-39).

In seeking the second extension, Respondents were simply exercising the free put option which would be afforded them by the Third Circuit's interpretation of the statute. Far from proving the Third Circuit's claim that "literal application of [the] statute would produce a result demonstrably at odds with the intention of its drafters," the history of this case reveals an extension granted outside of the statutory 60-day period to a debtor that had already concluded that it would not reject the lease. It is simply not tenable to hold that the language of Section 365(d)(4) was intended to provide such a result. The failure of the process of statutory interpretation could hardly be more obvious.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court issue a Writ of Certiorari.

Respectfully submitted,

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